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The Lawyer as Whistleblower: Confidentiality and the Government Lawyer

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ARTICLES

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The Civil Service Reform Act of 1978,[1] bolstered by the Whistleblower Protection Act of 1989,[2] provides protection to federal government employees who "blow the whistle" on fraud, waste and abuse. For the many lawyers employed by the federal government,[3] however, the Act poses a potential ethical dilemma. On the one hand, the Act encourages government employees, including government lawyers, to "serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary government expenditures."[4] On the other hand, rules of professional ethics, with limited exceptions, forbid lawyers from revealing confidential information acquired during the course of representing a government agency.[5] On some

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1. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

2. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of volume 5 of the United States Code).

3. The use of the term "government lawyer" throughout this article refers to federal government lawyers, although many of the concerns discussed apply with equal force to state and municipal lawyers. *See generally* William J. Baxley, *The State's Attorney*, 25 ALA. L. REV. 19 (1972); Douglas Sale, *The City Attorney's Relationship with Council and Staff: Determining Who Is the Client in Day-To-Day Affairs*, 11 CURRENT MUN. PROBS. 10 (1984); Ann B. Stevens, *Can the State Attorney General Represent Two Agencies Opposed in Litigation?*, 2 GEO. J. LEGAL ETHICS 757 (1989); Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966).

4. Whistleblower Protection Act of 1989.

5. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES]. Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
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> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

occasions the lawyer may reasonably believe that a client's confidential information evidences illegality, gross mismanagement or waste on the part of the agency or some of its officials. May the lawyer in this situation "blow the whistle?"

Examination of this dilemma sheds light on the special ethical responsibilities of government lawyers and raises many questions. Who is the government lawyer's client?[6] Does the duty of confidentiality apply to government lawyers with the same force as it does to privately employed lawyers?[7] Do the statutory protections provided to whistleblowers to encourage disclosure override professional duties of confidentiality?[8] The issues discussed here have been given little explicit consideration by legislators, officials and courts, but they have important implications for the behavior of lawyers in large organizations.[9]

I. THE PROFESSIONAL MILIEU OF THE GOVERNMENT LAWYER

The United States government employs more than 22,000 lawyers to handle its legal problems (two to three percent of all U.S. lawyers).[10] Most of these lawyers are employed full-time by one or another of the myriad departments or agencies of the executive branch.[11] The variety of legal work performed by government lawyers is nearly as broad as the breadth of legal activity generally. Lawyers for the federal government are advisors, counselors and litigators; and they deal in virtually every legal specialty, although for obvious reasons administrative law and federal specialties have special prominence in their work.

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(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the lawyer was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment 5 to Rule 1.6 further advises that "[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."

See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980) [hereinafter MODEL CODE] (predecessor rule of confidentiality, but permitting disclosure when required by other law).

6. *See infra* text accompanying notes 25-66.

7. *See infra* notes 19-23 and accompanying text.

8. *See infra* notes 69-79 & 100-107 and accompanying text.

9. *See, e.g.*, Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289 (1987) (discussing the duty of confidentiality to a corporate client under Model Rule 1.13(c)).

10. Marianne Lavelle, *The U.S. Lawyers Corps*, Nat'l L.J., Oct. 31, 1988, at 1, col. 1 (there are 18,698 federal government lawyers, excluding military personnel, according to the Office of Personnel Management).

11. *See* Ronald D. Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1 GEO. J. LEGAL ETHICS 85 (1987), for a discussion of conflict of interest and other problems that arise when the government employs private attorneys.

The United States does not have a general program of admitting, regulating and disciplining its own lawyers or those who practice in federal courts or before federal agencies.[12] Federal agencies require admission to the bar of a state as one of the qualifications for employment as a lawyer.[13] The Department of Justice and other federal agencies generally require their lawyers to conform to either an internal model professional code or to the professional code of a state; in addition, federal agencies have special procedures to review the conduct of their lawyers in accordance with these and other standards.[14] The federal courts in which federal lawyers represent the United States generally require an appearing lawyer to be admitted to the bar of the state in which the court sits or, in the case of appellate courts, from which it draws its cases. Also, state disciplinary authorities routinely assert supervisory authority over all lawyers admitted to the bar of that state.[15] Thus federal lawyers are generally subject to the profession's ethics codes in two different forms: one of the model codes adopted by the American Bar Association is directly applicable by agency regulation,[16] and a state code (either of the state of admission or that of practice or perhaps both) is applicable through the state's disciplinary mechanism.

The law of lawyering from state to state has many similarities, since it derives from the same common-law sources and is influenced by the model

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12. Federal courts are authorized by statute to regulate the lawyers who practice before them. Admission to the bar of the state in which the federal court sits is generally the only requirement imposed. The separation-of-powers question of whether the Judicial Branch of the Federal Government may regulate employees of the Executive Branch has arisen only rarely. *See* United States v. Klubock, 832 F.2d 649 (1st Cir. 1987) (confirming ability of district court to promulgate a procedural rule that would affect federal prosecutors' and grand juries' powers), *aff'd by an equally divided court on reh'g*, 832 F.2d 664 (1st Cir. 1987) (en banc). Additionally, the supremacy clause issue—may a state regulate practice before federal agencies or by federal government lawyers—also has arisen only rarely because federal law generally has required conformity with state rules of admission and practice. But if federal law does deal with these matters of federal concern, any inconsistent state law is preempted. *See* Sperry v. Florida, 373 U.S. 379 (1963) (Florida could not preclude a nonlawyer who had been admitted to practice as a patent agent before the U.S. Patent Office from advising clients in Florida about Patent Office matters).

13. For the purposes of this article, the District of Columbia is treated as another state.

14. 28 C.F.R. § 0.39 (1990).

15. MODEL RULES Rule 8.5 ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.")

16. *See* 28 C.F.R. § 45.735(1)(b) (1990) (standard of conduct of the Department of Justice incorporating the *Model Code*); 40 C.F.R. § 1103.10 (1988) (Canons of Ethics for Interstate Commerce Commission lawyers. "The canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound."); 31 C.F.R. § 10.51 (1988) (disbarment cause for suspension from practice before Internal Revenue Service). Now that the *Model Rules* have been adopted in one form or another in the majority of states, including the District of Columbia in 1990, federal agencies should consider whether to incorporate some form of the *Model Rules* as the federal guideline. *See also* 34 C.F.R. § 73 (1989).

codes promulgated by the American Bar Association.[17] Increasing lack of uniformity in this law among state codes threatens to accentuate pressures for uniform federal regulation of federal attorneys and federal courts. At present, however, federal lawyers generally are subject to the professional codes of the states in which they are admitted or are practicing, at least to the extent that these codes are consistent with federal law applicable to these lawyers. In at least this respect, federal lawyers have the same professional duties as lawyers in private practice.[18]

The government lawyer's duty of confidentiality differs from that of a lawyer in private practice in two significant ways. First, pervasive regulations govern much of the information with which a government lawyer must necessarily deal. A large portion of the information in the hands of the federal government consists of public records or information available upon request to the public. Recent legislation, in particular the Freedom of Information Act,[19] provides citizens with access to a wide range of government documents. An obvious corollary to such legislation is that a government lawyer's duty of confidentiality does not extend to information that the government has made available upon request to the public. In terms of the professional ethics rules, the government in effect has consented to disclosure.[20] Government lawyers also deal with more sensitive and more pro-

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17. The *Model Rules* have been adopted, usually with a number of variations and amendments, in more than 30 states. The *Model Code* provides the basic framework in the remainder of states. The District of Columbia Court of Appeals has adopted a version of the *Model Rules*; but major federal agencies, such as the Department of Justice, have internal regulations that are based on the *Model Code*. Most federal agencies refer to the ethics code in effect in the state where the federal lawyer is practicing, except as federal statute or regulations provide specific and overriding authority.

18. The *Model Code* contains a number of special provisions applicable to government lawyers. DR 7-103, dealing with the criminal prosecutor, requires that charges not be instituted unless supported by probable cause, and requires the prosecutor to disclose favorable evidence to the criminal defendant. Thus, the prosecutor has an obligation to fairness or justice that other lawyers do not have, as contained in EC 7-13 and EC 7-14. Rule 3.8 in the *Model Rules* is similar. Both professional codes contain special provisions dealing with the conflict-of-interest codification of case law emanating from *Model Code* DR 9-101. While the *Model Rules* were under consideration, the National Association of Attorneys General urged that government lawyers be excepted from a number of provisions, including all of those dealing with conflicts of interests. *See* William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 How. L. J. 539, 543 n.15, 557-58 n.86 (1986). These efforts failed, but the comments do include a number of references to the special situation of government lawyers. A special committee of the District of Columbia Bar has prepared a report for the District of Columbia Court of Appeals urging that some additional provisions and commentary be added to the District's version of the Model Rules to provide clarification and guidance to government lawyers. REPORT BY THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE OF GOVERNMENT LAWYERS AND THE MODEL RULES OF PROFESSIONAL CONDUCT, *reprinted in* THE WASHINGTON LAWYER, Sep.-Oct. 1988, at 53. [hereinafter D.C. REPORT].

19. 5 U.S.C. § 552 (1988).

20. MODEL RULES Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ."); MODEL CODE DR 4-101(c)(1) ("A lawyer may reveal . . . [c]onfidences or secrets with the consent of the client . . . .").

tected information than lawyers in the private sector. For example, government lawyers have access to military secrets, sensitive negotiations with foreign governments, grand jury minutes dealing with investigation of federal crimes and millions of records dealing with the most private matters of individuals and corporations. Information in the last category includes income tax records, medical records, and trade secrets. Not surprisingly, a detailed regulatory scheme limits the government lawyer's use of this information and prohibits its improper dissemination.[21] Protection of information of this character is not dependent solely on the attorney-client privilege or the lawyer's professional duty of confidentiality.

Second, the government lawyer functions within a complex federal system based on the principle of separation of powers.[22] It is an untidy structure of incredible complexity in which the President provides the principal focus of cohesion and unity while Congress, responding to interest groups, tends to further the centrifugal tendencies of a pluralistic society. The Constitution vests "executive power" in the President and legislative authority in the Congress, but in practice the functions are mixed, with independent agencies created by Congress having varying degrees of independence from presidential control and, conversely, the executive branch exercising delegated and inherent legislative authority in the form of executive orders, agency rules, and interpretive guidelines. The White House operates as a kind of command center, with specific responsibility for developing and implementing consistent policy objectives. Meanwhile, Congress plays an important role in determining the relative independence of the various agencies. For example, Congress may place decision-making authority for a certain matter in a particular official or remove an entire subject matter from White House control.[23] As a result, although the President has broad power within the executive branch, there are independent agencies, officers with specific delegated functions and quasi-governmental corporations each operating within their own spheres of authority.

The Attorney General's control of litigation in which the United States is a party follows a similar pattern. Although the Attorney General has broad control over government litigation, Congress has passed more than one hundred statutes giving particular agencies separate litigating authority.[24] The government lawyer in such a federal system must necessarily

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21. *See* 26 U.S.C. §§ 6103, 6104, 6108, 6110 (1988); 5 U.S.C. §§ 552, 552(a) (1988); 18 U.S.C. § 1905 (1988).

22. *See generally* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

23. *See generally* BERNARD SCHWARTZ, ADMINISTRATIVE LAW (3d ed. 1991).

24. *Cf.* 28 U.S.C. §§ 516-19 (1988) (containing the basic grant of authority to the Attorney General to control government litigation). For discussion of the general problem and a listing of statutory exemptions to the general statute, see Griffin B. Bell, *The Attorney General: The Federal Government's*

conform his conduct to statutes and regulations that do not apply to a lawyer in the private sector.[25]

In this unusual world, who is the government lawyer's client? The question has vexed decision-makers and commentators for many years. The possibilities include: (1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency. Although a scattering of support can be found for each possibility, the dispute has been primarily between a broader loyalty to "the public interest" or the government as a whole, on the one hand, and a more restricted vision of the government lawyer as the employee of a particular agency, on the other. With rare exceptions, the discussion has not taken full account of the array of constitutional and statutory obligations that override the simple issue of "who is the client?" The remainder of this part considers this question apart from the possible application of the whistleblower protections enacted in 1978 and expanded in 1989.

Normally, the identification of a lawyer-client relationship is a predicate to determining the lawyer's duties. Once a person is determined to be a lawyer's client, then the fiduciary and other obligations of a lawyer to that person attach: competence, confidentiality, diligence, loyalty (avoidance of conflict of interest), zeal and the like. However, the simplicity of this approach, in which duties flow inexorably from the existence of the lawyer-client relationship, belies the complexity of actual practice even in the case of private lawyers. A lawyer may owe certain duties to a person who is consulting the lawyer, even though both lawyer and prospective client are considering whether or not to establish the relationship.[26] When the lawyer renders services that are intended to benefit or influence third persons with whom the client has a relationship, the third persons may be treated as client equivalents for certain purposes.[27] When a lawyer represents a person

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Chief Litigator or One Among Many?, 46 FORDHAM L. REV. 1049 (1978). For examples of agency conflicts at the federal level, see Robert L. Stern, *"Inconsistency" in Government Litigation*, 64 HARV. L. REV. 759 (1951); Note, *Government Litigation in the Supreme Court: The Role of the Solicitor General*, 78 YALE L.J. 1442, 1459-61 (1969). *Compare* 28 U.S.C. § 518 (1988) (limiting agency authority to litigate appeals in federal courts and establishing the Supreme Court's reliance on the Solicitor General to screen cases as a practical constraint on agency separatism).

25. *See, e.g.*, 18 U.S.C. § 205 (1982) (prohibiting government employees from representing parties in actions against the United States or the District of Columbia); 18 U.S.C. § 207 (1982) (placing restrictions on successive government and private employment); and 18 U.S.C. § 208 (financial conflict of interest statute).

26. *See, e.g.*, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (lawyer who declined representation to person inquiring about a medical malpractice claim held liable for legal malpractice because he was negligent in suggesting that the claim lacked merit).

27. Some cases proceed on a third-party beneficiary contract theory. *See, e.g.*, Hale v. Groce, 744

with respect to a matter in which that person owes duties to a second person, such as when a lawyer represents a trustee, executor, or guardian, the lawyer may also have duties to those to whom the fiduciary is obligated.[28] The lawyer's duty to avoid conflicts of interest may flow to persons who are not clients in any ordinary sense of the word.[29] Thus the answer to whether or not a person or organization will be treated as a client depends on the purpose for which the inquiry is made.[30]

Other factors must be borne in mind when considering who is the client of the government lawyer. Even more so than the lawyer who represents a large, publicly held corporation, the government lawyer must deal with a wide range of interests, constituencies and competing values. "A government lawyer serves the interests of many different entities: his supervisor in the department or agency, the agency itself, the statutory mission of the agency, the entire government of which that agency is part, and the public interest."[31] These interests are not inchoate but are expressed in constitutional structure and duties, statutory command and regulatory obligations. The professional rules are drafted on the assumption that the normal case is one in which a lawyer is representing an individual client or an uncomplicated organization. Only in recent years has specific attention been given to the special problems that arise when a lawyer represents a complex organization.[32]

P.2d 1289 (Or. 1987) (intended beneficiary of a negligently drafted will has a cause of action against testator's lawyer). Others hold that in order for the non-client to succeed in a negligence action against an attorney, "the primary purpose and intent of the attorney-client relationship itself . . . [must] benefit or influence the third party." Greycas, Inc. v. Proud, 826 F.2d 1560, 1563 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (lawyer for borrower liable to lender for negligence in rendering legal opinion required by lender before completion of transaction) (quoting Pelham v. Greisheimer, 440 N.E.2d 96 (Ill. 1982).

28. For illustrations of two of these types of triangular relationships, see *Fickett v. Superior Court*, 588 P.2d 988 (Ariz. Ct. App. 1976) (attorney would be liable to estate conservator for failing to use reasonable care to discover misappropriation, conversion, or improper investment by guardian) and *Yablonski v. United Mine Workers*, 448 F.2d 1175 (D.C. Cir. 1971) (law firm may not represent both union and union president as individual due to actual or potential conflict of interest). *See also* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships*, 1 GEO. J. LEGAL ETHICS 15 (1987).

29. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (member of trade association for which Washington office of Chicago law firm had done legislative representation was a client for purposes of former client conflict-of-interest prohibitions).

30. *See* Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B. J. 61 (1978). Professor Wolfram, after reviewing the competing entities and abstractions that are candidates for the government lawyer's "client," says: "The answer . . . is that it depends. Distinctions must be drawn between the ordinary and the extraordinary, between some kinds of reasons for balking and others, and between levels of responsibility and authority within government." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.9.2, at 757 (1985).

31. Note, *Developments in the Law — Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1414 (1981) [hereinafter *Developments*].

32. *See generally* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A

For day-to-day operating purposes, the government lawyer may properly view as his or her client the particular agency by which the lawyer is employed. The Federal Bar Association proposed this rule of thumb in 1973, but immediately qualified it to include "those charged with [the agency's] administration insofar as they are engaged in the conduct of the public business."[33] The inquiry then turns to when the responsible officers are no longer "engaged in the conduct of the public business."[34] Fifteen years later, a special committee of the District of Columbia Bar reached a similar conclusion.[35] An analysis of the public interest versus agency approach demonstrates the good sense of their conclusions.

A. THE PUBLIC INTEREST APPROACH

Some years ago, Judge Fahy argued that "because the Government is a composite of the people[,] Government counsel therefore has as a client the people as a whole."[36] Under this approach, the government lawyer becomes "the maker of the conscience of the government."[37] This approach has several serious drawbacks. First, the public interest approach would interfere with the government lawyer's ability to function effectively as counselor and adviser to government officials.[38] Second, conceptions of the "public interest" vary significantly from one person to the next.[39] Third, the public interest approach raises separation of powers concerns.[40] In short, defining the government lawyer's client as the public interest would fail to provide any real guidance in regulating lawyers' conduct.[41]

The public interest approach distances the government lawyer from the officials that must rely on the lawyer's legal advice. The D.C. Committee summarized the problems inherent in this aspect of the public interest approach:

> If a lawyer is to function effectively as a counselor and advisor to elected

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HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 231-268 (1985).

33. Federal Bar Ass'n Professional Ethics Comm., Op. 73-1 (1973) ("The Government Client and Confidentiality"), *reprinted in* 32 FED. B.J. 71, 72 (1973).

34. *Id.*

35. D.C. REPORT, *supra* note 18, at 54 (concluding that the agency employing the government attorney should normally be regarded as his or her client).

36. Charles Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. B.J. 331, 332 (1974) (lecture delivered at Columbia Law School, April 11, 1950). *See also* Bell, *supra* note 24, at 1069 ("Although our client is the government, in the end we serve a more important constituency: the American people.").

37. Fahy, *supra* note 36, at 335.

38. D.C. REPORT, *supra* note 18, at 10-11.

39. *See infra* notes 45-91 and accompanying text.

40. *See infra* notes 50-54 and accompanying text.

41. D.C. REPORT, *supra* note 18, at 10.

> and appointed officials, those officials must not view the lawyer as some independent actor, liable at any time to arrive at some individualistic perception of the "public interest" and act accordingly. The governmental client, to be encouraged to use lawyers, must believe that the lawyer will represent the legitimate interests the governmental client seeks to advance, and not be influenced by some unique and personal vision of the "public interest."[42]

Other commentators share the D.C. Committee's concern for preserving the efficacy of the relationship between agency officials and government lawyers. For example, Bruce Fein[43] stated that "[n]either the Constitution nor the electorate has entrusted the government attorney with an independence to determine what policies are enlightened or advance the cause of justice, and to dedicate his legal talents to furthering his personal public policy desires."[44] The underlying problem in the public interest approach derives from the government lawyer's discretion to fashion a personal and subjective notion of the public good.

The D.C. Committee also concluded that "the 'public interest' was too amorphous a standard to have practical utility in regulating lawyer conduct."[45] As Professor Geoffrey Miller observed, "there are as many ideas of the 'public interest' as there are people who think about the subject."[46] This aspect of the public interest approach simply has no place in a representative democracy.[47] In effect, the public interest approach invites each government lawyer to analyze and define the public interest, a task than no individual lawyer can hope to perform on his own.[48] Furthermore, a government lawyer who attempts to define the public interest "is not a lawyer representing a client but a lawyer representing herself."[49]

Separation of powers concerns also weigh against adoption of the public interest approach. Suppose, for example, that a government lawyer refuses to participate in the creation of a program on the grounds that it violates Supreme Court precedent and lacks congressional authorization.[50] He bases

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42. *Id.*

43. Fein served as general counsel of the Federal Communications Commission during the Reagan administration.

44. Bruce Fein, *Promoting the President's Policies Through Legal Advocacy*, 30 FED. B. NEWS & J. 406, 408 (1983).

45. D.C. REPORT, *supra* note 18, at 10. *See also* Sale, *supra* note 3, at 11 ("The public interest . . . is a vague and a meaningless abstraction, useless in practice. It is impossible to represent the entire community which is always divided.").

46. Miller, *supra* note 22, at 1294-95.

47. Josephson & Pearce, *supra* note 18, at 565.

48. *Developments*, *supra* note 31, at 1414.

49. Josephson & Pearce, *supra* note 18, at 564.

50. The hypothetical is drawn from Geoffrey Miller's discussion of this issue. *See* Miller, *supra* note 22, at 1295-96.

his refusal on a belief that he represents the government as a whole, and that his participation in such a program would disserve the judicial and legislative branches of government.[51] The government lawyer's assumption, however, fails to take into account the fact that he operates "within a system of separation of powers and checks and balances."[52] In such a system, "it is not the responsibility of an agency attorney to represent the interests of Congress or the Court."[53] Instead, the constitutional system places a premium on "the institutional loyalty of its lawyers."[54] The public interest approach threatens the separation of powers and fails to adequately protect this constitutional system.

B. THE AGENCY APPROACH

The Professional Ethics Committee of the Federal Bar Association and the D.C. Committee both endorsed the "agency as client" approach.[55] The D.C. Committee emphasized that the agency approach would "provide bounds and give concrete meaning to the lawyer-client relationship in the government context."[56] The D.C. Committee asserted that "identification of the client with the employing agency" fulfilled three purposes.[57] First, it allowed a government lawyer, in the vast majority of situations, to clearly determine his or her duties and obligations. Second, it permitted agency officials to rely on the government lawyer "in the same way that a private client can rely on its private lawyer."[58] Third, it allowed the D.C. Bar to subject all its members, no matter how employed, to its disciplinary rules.[59] Adoption of the public interest approach, on the other hand, would not fulfill any of these purposes.[60]

The D.C. Committee did not contend that the agency approach would answer every ethical question.[61] It did suggest, however, that the agency approach provided a rule of thumb to guide the ethical conduct of government lawyers.[62] The Federal Ethical Considerations (F.E.C.) adopted by the National Council of the Federal Bar Association in 1973 also support

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51. *Id.*
52. *Id.* at 1296.
53. *Id.*
54. *Id.*
55. *See supra* notes 33-35 and accompanying text.
56. D.C. REPORT, *supra* note 18, at 15.
57. *Id.*
58. *Id.*
59. *Id.*
60. *See supra* notes 36-54 and accompanying text.
61. D.C. REPORT, *supra* note 18, at 15.
62. *Id.* at 17.

the agency approach.[63] For example, F.E.C.-5-1 states, "[t]he immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency."[64] Although F.E.C.-5-1 refers to the "public interest," it does not suggest that the government lawyer must defer to the "public interest function" of the agency.[65] Any other conclusion would "lead[] to a government of lawyers, not of laws, a result as objectionable as a government of people, not of law."[66]

C. A STRUCTURAL APPROACH

The simple rule of thumb that "the employing agency should in normal circumstances be considered the client of the government lawyer"[67] offers useful guidance to government attorneys. For most day-to-day purposes, a government lawyer properly may consider the employing agency as the client. Responsible officials of that agency hire the lawyer, provide instructions and supervision, and make decisions concerning change or termination of employment. But the agency approach does not reflect the complex web of institutional arrangements, regulations, statutes, and constitutional commands that shape the government lawyer's actions in those situations in which they come into play. On some occasions, the general litigating authority of the Department of Justice may alter the responsibilities of the agency lawyer. Obligations to report wrongdoing to officials within and without the agency may override normal duties of confidentiality owed to the agency and its responsible officials. If the particular activity is subject to the direction of the President, and the President chooses to exercise authority, the head of the executive branch displaces the agency head as the authoritative architect of government policy. Discussion of some illustrative situations will clarify these points.

Assume that Charles Hughes[68] works on the legal staff of a federal agency that administers a major federal program subsidizing private activity. In the course of providing legal advice on subsidy applications, he learns from the head of the agency that a particular application was approved ahead of many others because the applicant had plied the official with special favors, including an all-expenses paid trip to last year's Super

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63. *See* Federal Ethical Consideration 501 (adopted Nov. 17, 1973), *reprinted in* C. Normand Poirer, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A. J. 1541 (1974).

64. *Id.* at 1543.

65. *Id.*

66. Josephson & Pearce, *supra* note 18, at 569.

67. D.C. REPORT, *supra* note 18, at 54.

68. Miller, *supra* note 22, utilizes similar hypotheticals involving Christopher Langdell, another turn-of-the-century lawyer (but one with no relation to the Cornell Law School).

Bowl.

Do duties of confidentiality prevent Hughes from disclosing this information to an appropriate law enforcement official within or outside his agency? The intuition that tells one that the answer must be "no" is correct. But reflect a minute on some potential difficulties in reaching this conclusion. If Hughes was a lawyer in private practice and an individual client, in seeking legal advice from him, had revealed information indicating the commission of a past crime, Hughes could not disclose the information without violating his professional obligations. A voluntary disclosure would violate the professional duty of confidentiality,[69] and the attorney-client privilege would prevent the forced disclosure of the information by a tribunal authorized to summon evidence.[70] If Hughes represented a private client who had bribed an official (other than the tribunal before whom the lawyer is representing the client), and this information was communicated to the lawyer during the course of representation, one of the stronger cases for confidentiality would forever seal the lawyer's lips (except to the extent that disclosure was in the client's interest and with the client's consent). Why is the situation different when Hughes receives the information as a government lawyer?

The short answer, of course, is that Hughes doesn't represent the officer in the latter's individual capacity. True, he may have been hired by the officer and be supervised by and somewhat dependent upon the officer. Yet Hughes works for an agency of the executive branch of the Government of the United States, not for an individual who temporarily occupies one of its offices.[71] The officer should understand that; if he does not, Hughes should take early steps to relieve the officer of the false impression that Hughes is his personal lawyer. The situation is not unlike that of in-house counsel for a public corporation who learns from an officer of the corporation that the officer has violated duties owed to the corporation. The lawyer should take steps to protect the interest of the corporation, including disclosure to the highest authority within the organization, usually the board of directors, even though there is much personal loyalty and a longstanding relationship

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69. MODEL CODE DR 4-101 (1980); MODEL RULES Rule 1.6 (1983); *see also* WOLFRAM, *supra* note 30.

70. WOLFRAM, *supra* note 30, at 253-4.

71. Some commentators analogize to *Ex parte Young*, 209 U.S. 123 (1907), in which an action against a state office for federal constitutional violations was held not barred by the Eleventh Amendment. When the state officer violates the federal constitution, "he is . . . stripped of his official representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 159-160. It is unnecessary, in the case of the federal officer, to apply this theory, since federal statutes require federal employees to reveal criminal misconduct by other federal employees to an appropriate law enforcement officer. *See, e.g.*, 28 U.S.C. § 535(b) (1968) (advising that violations should be reported to the Attorney General by the department or agency head).

with the officer.[72] The information or privilege is that of the corporation, not the officer, and the corporation's highest authorities may ultimately decide to disclose the information that Hughes has received.[73]

As a federal lawyer, Hughes has statutory duties[74] to report criminal misconduct to the head of his agency, and, if the agency head is involved, to the Attorney General. These duties would preempt the District of Columbia professional code if the latter purported to prohibit Hughes from disclosing the communication outside the agency in which he is employed (assuming that Hughes practices in the Washington, D.C., headquarters of his agency).[75] There is no conflict, however, if the executive branch is viewed as the client when corrupt official behavior is involved. The duty of disclosure inside the organization does not stop at the boundaries of the agency. Federal law requires that illegality be reported to appropriate law enforcement officials, who are ultimately subject to presidential authority as head of the executive branch. Under this view, however, disclosure other than to appropriate law enforcement officers would not be professionally appropriate.

Consider, however, a second scenario. In this one Hughes is asked to assist the responsible agency officials in a course of action suggested or determined by a new administration. The proposed action—it could be promulgation of a legislative rule, a change of position in ongoing or frequent litigation or the major alteration or abandonment of a current federal program—is politically sensitive and raises substantial legal issues. At one end of the spectrum, the proposed action, in Hughes's view, is clearly illegal: unauthorized by statute, directly contrary to controlling court decisions or violative of well-established constitutional rights. At midpoint on the spectrum, it is of uncertain legality, but plausible legal arguments can be made on its behalf. Toward the other end of the spectrum, it is a legal option

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72. *See* MODEL RULES Rule 1.13(b). A lawyer who learns that a corporate officer or employee is or has violated a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, "shall proceed as is reasonably necessary in the best interest of the organization." *Id.*

The lawyer's actions may include (1) "asking reconsideration of the matter;" (2) asking for a separate legal opinion "for presentation to appropriate authority in the organization;" and (3) "referring the matter to higher authority in the organization . . . ." *Id.* As adopted by the American Bar Association, Rule 1.13 does not contemplate disclosure outside of the organization which has retained the lawyer. For criticism of this position, *see* Gillers, *supra* note 9.

73. *See* United States Indus. Inc. v. Goldman, 421 F. Supp. 7, 11 (S.D.N.Y. 1976); Meehan v. Hopps, 301 P.2d 10, 15 (Cal. Ct. App. 1956) (both cases holding that a corporate lawyer who receives confidential information from a corporate officer is not disqualified from representing the corporation against the officer in litigation to which the confidential information relates); *see* WOLFRAM, *supra* note 30, at 284-289.

74. *See* 28 U.S.C. § 535(b) (1968).

75. *See supra* note 12.

available to the agency, but strong policy arguments can be made against it. Should Hughes, who shares the policy objections against the proposed action, do legal work on the proposal? May he seek to mobilize political support against the proposal by disclosing the agency's plans or its legal strategy?

If an individual client asked Hughes to do legal work under these varying circumstances, Hughes's professional obligations would be fairly clear. Hughes could exercise his choice as to whether to undertake the representation, and his dislike for the cause could be an important or controlling factor in his decision.[76] If the proposed action was clearly illegal (one end of the spectrum), or the lawsuit involved a frivolous claim or defense and the client did not have a good faith basis for arguing for a change in the law, Hughes would be required to refuse assistance.[77] If the proposal is not clearly illegal, however, Hughes would be free to undertake representation. Having done so, he would be required to put his personal feelings aside except as they might be brought to bear to persuade the client to alter the goals of representation or to assist in achieving the client's goals.

What difference does it make that Hughes is a full-time staff attorney for the agency undertaking the proposed action? Unless the agency accommodates a request to be assigned to other work, a request that in itself may have adverse effects on Hughes's future, Hughes is faced with a starker choice. If ordered to proceed, he must do so or resign. Even if the case for illegality is strong, the proposal was unlikely to be advanced unless there was something to be said for its legality. The reinterpretation of old law and the development of new law often flow from executive initiative founded on an electoral mandate. The leeway of a new President, armed with a victory at the polls, to argue for a change in the law, either by a reinterpretation of a statute or the distinguishing or overruling of prior court decisions, is substantial.[78] American history is studded with instances in which Presidents attempted, often successfully, to move the law in a new direction.

If Hughes does undertake to work on the matter, to whom does he owe loyalty and confidentiality? Normally, unless the action is clearly illegal, Hughes is obliged to advance the goals of the agency and the executive branch. Only in the extreme case, where the proposal is indisputably illegal, do the professional rules and statutory obligations prohibit Hughes

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76. MODEL CODE DR 7-102(A)(1) and (2); MODEL RULES Rule 3.1. *See also* WOLFRAM, *supra* note 30, § 4.1.

77. MODEL CODE DR 7-102(A)(1); MODEL RULES Rule 3.1. *See also* WOLFRAM, *supra* note 30, §§ 4.1, 6.

78. *See* Fein, *supra* note 44 (using Franklin Roosevelt and Abraham Lincoln as examples of presidents who were able to further their policy objectives despite legal obstacles).

from providing legal assistance. Lawyers, as well as other federal employees, are obligated to uphold the Constitution and the laws of the United States. In addition, as a lawyer, Hughes may not assist in pursuing frivolous claims or defenses in litigation or assist in carrying out a crime or fraud. If clear illegality is involved, he may neither undertake representation nor continue after it is discovered. But a legal rule or litigation posture for which a good faith argument exists, even though there is some likelihood that it will be found to be illegal, is not a crime or fraud. And there are strong arguments in support of the position that the appropriate government policy-maker, not Hughes, should make the decision whether to test the legitimacy of the proposed action. We are a process-oriented society that has reached a high degree of agreement on the procedures and institutions by which political controversy should be resolved. The decision should be made by officials who are elected and appointed for that purpose rather than by staff lawyers.

More detail is needed about the particular problem and agency before a confident response can be given as to who is the appropriate decision-maker.[79] If rule-making or litigating authority has been delegated to an independent agency or to an officer who is substantially immunized from executive branch control, the agency or officer is Hughes's client. In the more usual situation in which ultimate policy in the executive branch is determined by the President, disclosure beyond the agency for which Hughes works should not be a problem. Assuming the (unlikely) situation in which an agency is secretly working against the policy approach of the President, disclosure of the agency's position to the White House is appropriate. Another variant of the same problem is a case in which the Attorney General has statutory authority over the litigation, but several agencies or departments have strong and divergent interests. The Department of Justice, for example, may represent the Environmental Protection Administration (EPA) in the action, but the responsibilities of the Departments of Energy and Transportation are affected and they take positions contrary to that of EPA. Lawyers in the Environmental Division of Justice who are working on the case should be free to communicate with each of the three agencies in an effort to formulate a common policy, obtain information or improve the Government's overall litigating position. If the policy disagreement is a major political issue, the President may properly seek to make the decision. Any notion that a lawyer working for EPA would breach con-

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79. I agree with much of the thrust of Bruce Fein's argument that government attorneys have an obligation in their representation and advocacy to promote the policies of the incumbent President. If ultimate decision-making authority has been constitutionally vested in the lawyer's agency rather than the President, however, the government lawyer should defer to the wishes of the agency rather than those of the President.

fidentiality by communicating facts, work product or litigating strategy to officials in any of the agencies or officials involved in the matter is unfounded. Only disclosure beyond the Executive Branch, or out of proper channels, would be violative of the professional duty of confidentiality. In this type of situation, and for this purpose, the executive branch, headed by the President, is best viewed as the lawyer's client.

II. THE EMERGENCE OF LEGAL PROTECTION FOR WHISTLEBLOWERS

The common-law doctrine of employment-at-will is a distinctive attribute of the Anglo-American commitment to individual enterprise and free markets.[80] Under this doctrine, employers and employees are free to end their economic relationship at any time, absent express agreement to the contrary.[81] Either party may terminate the relationship for any reason, or for no reason at all.[82]

Efforts to provide employees with greater job security have taken many forms, including the union movement, a judicially developed public policy exception to the employment-at-will doctrine[83] and legislative measures designed to protect employees against arbitrary discharge.[84] For government employees, civil service laws enacted during the Progressive Era provide a substantial measure of job security. Nevertheless, although the federal civil service system was steadily formalized and strengthened, until 1978 it provided no general protection against retaliatory discharge for federal employees who disclose information outside the agency in which they were employed in order to correct or prevent law violations. A scattering of federal statutes provided such protection to both private and public sector employees in special contexts, mostly involving health and safety regulation.[85] The first comprehensive legislation to protect the federal employee

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80. Based upon the freedom of contract, the common law employment-at-will doctrine provided that the term of employment extended indefinitely and either party could terminate the economic relation at any time. *See* John L. Howard, *Current Developments in Whistleblower Protection*, 39 LAB. L.J. 67, 68 (1988).

81. Seymour Moskowitz, *Employment-At-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U.L. REV. 33, 33 (1988).

82. *Id.* The employment-at-will doctrine provides employees with incentives to be efficient and permits them to respond quickly to increased demand for their services. It also serves efficiency goals by providing employers with considerable control over employees. The ability of employees to protect themselves depends upon the changing supply and demand characteristics of labor markets.

83. Howard, *supra* note 80, at 68-69.

84. *Id.* at 69-71. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 157 (1988).

85. Howard, *supra* note 80, at 69. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (1981); Occupational and Health Safety Act, 29 U.S.C. § 660 (1985); Federal Coal Mine Health and Safety Act, 30 U.S.C. § 815(c) (1986); Atomic Energy Act, 42 U.S.C. § 5851 (1983); Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 2305 (West Supp. 1991); Clean Air Act, 42 U.S.C. § 7622 (1983); Water Pollution Control Act, 33 U.S.C. § 1367 (1986); Toxic Sub-

who blows the whistle occurred in 1978.[86]

The Civil Service Reform Act of 1978 was designed to strengthen management control of the federal workforce.[87] The bill was amended, however, to add whistleblower protection and investigation provisions.[88] Included in the Act as a "prohibited personnel practice" were specific forms of retaliation against whistleblowers.[89] Enforcement of the new whistleblower protection was entrusted to a newly created Office of Special Counsel (OSC) and to decisions issued by the Merit Systems Protection Board (MSPB).[90]

Expectations that this statutory regime would encourage federal employees to speak out against government wrongdoing were misplaced.[91] Only a relatively small number of federal employees followed the special procedure created by the Act, and most of those who did received very little in the way of protection against employment retaliation.[92] Sponsors of the original legislation attacked the OSC's administration of the whistleblower protection provisions and led a determined effort to change the process and enlarge the protection. These efforts culminated in adoption of the Whistleblower Protection Act of 1989, which gave increased independence and authority to the Special Counsel and greater procedural protection to whistleblowing employees.[93]

The Civil Service Reform Act of 1978, as amended by the Whistleblower Protection Act of 1989, prohibits an agency official from taking an adverse personnel action against an employee because of the em-

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stances Control Act, 15 U.S.C. § 2622 (1988 and Supp. 1991); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (1982); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1983).

86. *See* Civil Service Reform Act of 1978.

87. *Id. See also* Patricia Schroeder, *Introduction*, 4 ANTIOCH L.J. 1, 2 (1986).

88. Schroeder, *supra* note 87, at 2.

89. Civil Service Reform Act of 1978.

90. Thomas M. Devine & Donald G. Alpin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection*, 4 ANTIOCH L.J. 5, 7 (1986).

91. Rather than protecting whistleblowers, the OSC frequently worked with agency management to harm them. Schroeder, *supra* note 87, at 2-3.

92. 135 CONG. REC. H747 (daily ed. March 21, 1989) (statement of Rep. Sikorski); *Id.* at H751 (statement of Representative Schroeder) ("For the past 8 years, the Office of the Special Counsel has been as supportive of whistleblowers as Frank Lorenzo is supportive of Eastern's machinists.").

93. Representative Schroeder introduced the Whistleblower Protection Act of 1986 to broaden the protection for whistleblowers and create "an alternative route to get their cases heard." Schroeder, *supra* note 87, at 3. Although the House of Representatives approved the bill, the Senate did not act upon it before adjournment in 1986. S. REP. NO. 413, 100th Cong., 2d Sess., 7 (1988). The Whistleblower Protection Act of 1988 was unanimously approved by both Houses of Congress, only to be pocket vetoed by President Reagan. 135 CONG. REC. S2779 (daily ed. March 16, 1989) (statement of Senator Levin). The Whistleblower Protection Act of 1989 was finally approved by both Houses and signed by President Bush. 135 CONG. REC. S2805 (daily ed. March 16, 1989) (97 yeas, 3 not voting); 135 CONG. REC. H754 (daily ed. March 21, 1989); Remarks on signing the Whistleblower Protection Act of 1989, 25 PUB. PAPERS 516 (April 10, 1989).

ployee's disclosure of certain information.[94] Paragraph (A) protects any disclosure of information not "prohibited by law" that evidences: (1) a violation of law, rule or regulation; (2) gross mismanagement; (3) a gross waste of funds; (4) an abuse of authority; or (5) a specific and substantial danger to public health or safety.[95] The language contemplates a disclosure to anyone inside or outside the agency in which the whistleblower is employed, including, for example, a reporter, a congressional staffer or an interest-group representative.[96] Paragraph (B) protects a similar disclosure to the Special Counsel of the Merit Systems Protection Board, to the Inspector General of an agency or to another employee designated by the head of an agency to receive such disclosures.[97]

The disclosure of information is protected if the employee "reasonably believes" that the information "evidences" the specified type of wrongdoing. The required state of mind is both subjective and objective: the employee must believe that the information is of the specified character; in addition, the belief must be reasonable in the sense that a reasonable person, knowing the facts known to the employee, might reasonably conclude that the information has that character.[98] The boundaries of the protected

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94. Section § 2302 (b) (8) provides that an employee shall not "take or fail to take a personnel action with respect to any employee . . . as a reprisal for—

> (A) a disclosure of information by an employee . . . which the employee . . . reasonably believes evidences—
> (i) a violation of any law, rule, or regulation, or
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs . . . .

5 U.S.C.A. § 2302 (b) (8) (West Supp. 1990). *See* Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615.

95. 5 U.S.C.A. § 2303 (B) (8) (A) (West Supp. 1990).

96. The Whistleblower Protection Act of 1989 changed the phrase "a disclosure" in the statute defining the prohibited personnel practice to "any disclosure," to emphasize that "*any* disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential)." S. REP. NO. 413, *supra* note 93, at 13 (emphasis in original). *See* Fiorillo v. United States, 795 F.2d 1544 (Fed. Cir. 1986); Vaughn, *supra* note 24, at 631-633.

97. 5 U.S.C.A. § 2302 (b) (8) (B) (West Supp. 1991).

98. *See* Sower v. Department of Transp., 24 M.S.P.R. 492 (1984) (forestry technician required to hold a "sincere" belief of agency's mismanagement and grossly wasteful policies in order to qualify for whistleblower protection); Prescott v. Department of Health & Human Serv., 6 M.S.P.R. 252 (1981) (reasonable belief required to qualify for protection under § 2302 (b) (8)); Ramos v. Federal Aviation Agency, 4 M.S.P.R. 388 (1980) ("whistleblowers" need not prove actual statutorily specified condition but need only show reported condition was one which they reasonably believed to be specified condition); Vaughn, *supra* note 94, at 625-626 (discussing "reasonable belief" requirement). *See also* MODEL RULES Terminology (" '[R]easonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.").

categories generally include only disclosures of substantial importance.[99]

Paragraph (A) involves a potential conflict with the lawyer's professional duty of confidentiality because it appears to authorize disclosure of information that would normally be protected by the attorney-client privilege and the professional duty of confidentiality. A lawyer employed by the federal government will frequently possess information that falls within the protected categories. Whenever an agency takes a position of questionable legal authority, there is likely to be the basis for a "reasonable belief" that a violation of law or regulation is involved. The Act suggests that an agency lawyer would be protected against employment retaliation in leaking internal memoranda in which agency heads were laying plans for a novel and questionable, although plausible, extension of regulatory authority. Similarly, if legal materials suggested that certain agency action was mandated, an agency decision not to institute enforcement proceedings in a particular situation might reasonably be viewed as constituting a "violation of law." The litigation strategy of the government or the terms on which it was willing to settle a controversy might under some facts lead to a reasonable belief that "a gross waste of funds" was involved. Virtually any action or failure to act in the health and safety field might lead to a reasonable belief of "a specific and substancial danger to public health or safety." If these are permitted disclosures, the confidentiality duties of lawyers employed by the federal government have been significantly eroded.

State ethics rules are normally applicable to federal lawyers, who are required by federal regulation to be members of the bar of a particular state.[100] Questions concerning the interplay of state ethics rules and federal

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99. The 1989 amendment to the Civil Service Reform Act of 1978 changed the definition of protected disclosures from "mismanagement" to "gross mismanagement." S. REP. No. 413, *supra* note 93, at 13 (expressing the Committee's concern that employees who have made disclosures of trivial matters may use the remedies provided under section 2302). *See also* Henry v. Department of Transp., 19 M.S.P.R. 70 (1984) (air traffic controller's participation in a strike was not considered a disclosure of gross mismanagement); Walsh v. Environmental Protection Agency, 25 M.S.P.R. 460 (1984) (employee's support of a peer who was harassed at work constituted disclosure of abuse of authority); Prescott v. Department of Health and Human Serv., 6 M.S.P.R. 252 (1981) (termination of agency research into child abuse and neglect and the developmental origins of violence did not constitute a "substantial and specific danger to public health or safety"); S. REP. No. 969, 95th Cong., 2d Sess. 1, 21 (1978) *reprinted in* 1978 U.S.C.C.A.N. (91 Stat. 1111) 2723, 2743, stating:

> the committee intends that only disclosure of public health or safety dangers which are both *substantial* and *specific* are to be protected. Thus, for example, general criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected under this subsection. However, an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower protections.

(emphasis in original).

100. *See supra* note 12 and accompanying text. *Cf.* WOLFRAM, *supra* note 30, § 2.2, at 33 (discussing the inherent powers of courts to regulate lawyers and the separation of powers between state and

law enforcement policies have raised issues as to whether state law (including its disciplinary authority) is applicable to federal prosecutors who utilize longstanding federal policies and practices in the enforcement of federal statutes.[101] Controversies over federal policies involving investigation of crimes may sometimes run afoul of the state ethics rule that prohibits a lawyer from making direct contact with a person known to be represented;[102] similarly, federal policies relating to a grand jury subpeona to a lawyer, concerning client affairs, must first be approved by a judge, a requirement a few states now include in their professional codes.[103] In these and other situations the alleged conflict between state and federal law involves a state ethics rule, applicable to federal attorneys practicing in the state, and more general federal law enforcement powers and policies. The whistleblower protection provisions involve specific legislation addressed to disclosure and confidentiality by agents of the United States. Although their conflict with state rules governing lawyers (and other professionals) does not appear to have been considered by Congress, the statutory exceptions are limited to federal statutes expressly providing for confidentiality. The supremacy clause leaves little room for the application of state law unless the courts were to read into the Act a broad exemption of lawyers.[104]

The remaining and critical interpretive issue is whether the "prohibited by law" exception incorporated in the whistleblower provision includes the obligations of lawyer confidentiality imposed by federal law. The normal confidentiality duties applicable to government attorneys have their source either in the professional codes adopted by state and federal courts which are applicable to lawyers practicing law in particular states or in particular courts; or in regulations adopted by federal agencies that apply particular professional codes to their lawyers or otherwise require confidentiality as to particular matters.[105] Although there is a possibility that a substantive reg-

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federal constitutions).

101. I am currently working on an article with Lisa K. Udell entitled "Serving Two Masters: State Ethics Rules and Federal Prosecutors" which will be published in the University of Pittsburgh Law Review. Our article discusses the conflicts between state ethics rules and federal law enforcement policies and argues that the latter should prevail.

102. MODEL RULES Rule 4.2 (a lawyer may not communicate with a represented person without the consent of that person's lawyer).

103. MODEL RULES Rule 3.8(f) (1983, as amended in 1990); *Klubock*, 832 F.2d 649 (affirming power of district court to adopt rule requiring prosecutors to see prior judicial approval before serving grand jury subpeona upon attorney in order to gain information about attorney's clients).

104. *See Sperry*, 373 U.S. 379 (state unauthorized practice of law rules preempted by federal rules governing patent agents); Maryland v. Louisiana, 451 U.S. 725, 747 (1981) (state statute void if it conflicts with federal statute).

105. Lawyers in the Department of Justice, for example, are governed by standards of conduct that incorporate by reference the *Model Code* as a guide, but provide for official interpretations of the *Model Code* by Department officials. 28 C.F.R. § 45.735 (1988).

ulation based upon delegated legislative authority may have the status of a "law" that specifically prohibits disclosure, the legislative history of the whistleblower provisions strongly suggests that internal procedural regulations of federal agencies do not have such status.[106]

The seemingly protected disclosure of information loses its protection, however, if disclosure is "specifically prohibited by law and if such information is not specifically required by an Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs."[107] The legislative history makes clear that the reference to national defense and foreign affairs in the latter clause does not modify the phrase "specifically prohibited by law."[108] If it did so, criminal statutes prohibiting the disclosure of highly sensitive information (trade secrets, individual tax or medical records, etc.) would be nullified by the whistleblower protection provisions.[109]

Putting aside, then, instances in which a lawyer is dealing with secret or classified information protected by an executive order, the question is whether agency regulations requiring confidentiality as to certain matters fall within the phrase "specifically prohibited by law". "Law" is a broad term that normally includes any authoritative statement of legal principle, whether in the form of statute, case law or agency rule. In this case, however, the legislative history indicates that a narrower meaning was intended. The House report states that "law" includes only statutes that prohibit disclosure and judicial decisions interpreting those statutes.[110] The Senate report notes that a broader reference to disclosures " 'prohibited by law, rule or regulation' would encourage agency adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing."[111] The report goes on to describe which types of statutes prohibit public disclosures:

> a statute which requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or . . . a statute which

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106. H.R. CONF. REP. No. 1717, 95th Cong., 2d Sess. 127, 130 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864 ("The reference to disclosures specifically prohibited by law . . . does not refer to agency rules and regulation.").

107. 5 U.S.C.A. § 2032(b) (8) (A) (West Supp. 1990).

108. As an example of a limitation on public disclosures by whistleblowers, the House conference report cites 18 U.S.C. § 1905 (prohibiting public disclosures of information regarding trade secrets and private financial data). H.R. CONF. REP. No. 1717, *supra* note 106, at 132, 1978 U.S.C.C.A.N. at 2865. *See also* 135 CONG. REC. S2784 (daily ed. March 16, 1989) (remarks of Sen. Levin indicating that security agreements also limit whistleblower protection).

109. *See, e.g.*, 18 U.S.C. § 1905 (1988).

110. H.R. CONF. REP. No. 1717, *supra* note 106, at 130, 1978 U.S.C.C.A.N. at 2864.

111. S. REP. No. 969, *supra* note 99, at 21, 1978 U.S.C.C.A.N. at 2743.

> establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .[112]

Since no statute directly addresses the issue of public disclosures on the part of lawyers employed by the federal government, agency regulations requiring lawyer confidentiality appear to be overriden by the whistleblower protection provisions. That is, a covered lawyer who makes a public disclosure of information protected by the whistleblower provisions may not be subjected to retaliatory employment actions. The prohibition surely includes any effort by a federal agency to discipline a lawyer for a violation of professional duties of confidentiality. Although the whistleblower provisions deal expressly only with retaliatory actions of the employing agency, the application of professional discipline by a state disciplinary board is likely to be precluded. If that were not the case, the federal goal of assuring disclosure of official wrongdoing would be subverted by state law, which expresses a contrary policy of protecting confidences. The supremacy clause assures that the federal policy of disclosure prevails over the inconsistent state policy of confidentiality.

Consider some of the scenarios earlier discussed in the light of this interpretation of the whistleblower provisions. Suppose that lawyer Hughes, asked to assist agency officials in an action that Hughes reasonably believes involves a violation of law or a threat to health and safety, desires to go outside ordinary channels in an effort to prevent or to publicize the proposed action. Paragraph (B) of section 2303(b)(8) poses little problem. It now authorizes federal employees to disclose covered conduct via a special channel—the Special Counsel of the Merit System Protection Board. This official is an officer of the executive branch who performs certain investigative and ombudsman-like functions. The disclosure is limited in character and may be viewed in much the same terms as the prior provisions permitting disclosures of illegal conduct to be made to an agency's inspector general or to an appropriate law enforcement officer in the Department of Justice. Viewed in the light of legal ethics, the lawmaking authority for the "client" (Congress) has waived or modified normal rules of confidentiality by creating an additional permissive channel for reporting misconduct. Just as a statute may alter confidentiality arrangements by vesting review or litigating authority in an officer of the United States outside the employing agency, so may it create a special channel for reporting misconduct within the executive branch.

However, paragragh (A) of section 2302(b)(8) is more troublesome because it permits disclosure to be made not only to another official of the executive branch but to anyone—a reporter, a member of the public, a

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112. *Id.*

member of congress, etc. As such, it raises some separation of powers concerns, but ones that seem little different from prior statutes that made government information available to the public, such as the Freedom of Information Act. The executive branch, even the President, is subject to demands for information created by statute or judicial need.[113]

Suppose, for example, that Hughes had informed the head of his agency and, subsequently, an appropriate official of the Department of Justice, of corrupt behavior on the part of an official of Hughes's agency. Their failure to act has persuaded Hughes that these law enforcement officers are part of an effort to cover-up criminal wrongdoing that was politically embarrassing to the current administration. The requirements of the whistleblower provisions are met because the circumstances justify a reasonable belief that officials have violated the law. General professional duties of confidentiality are overridden by the more specific permission of disclosure afforded by the whistleblower enactments. Nor in this situation is the result an undesirable one, since disclosure of serious government wrongdoing is more important than the professional duties that Hughes owes to his agency. It is unthinkable that a state disciplinary proceeding could punish conduct that a federal statute, embodying a contrary policy of disclosure, had given a protected status.

In other situations, however, not involving a high level cover-up of corrupt conduct, but only reasonable differences of opinion concerning the legality or wisdom of a proposed agency action (e.g., does the agency's rule sufficiently protect health or safety?), there is a serious concern that the whistleblower protection goes too far in eroding the loyalty and confidentiality that government lawyers owe to the governmental client. Suppose, for example, that a government lawyer who believes that waste will result if the agency settles a case that might be won after a full trial sabotages the settlement by revealing the government's settlement position. If the conditions for whistleblower protection are satisfied, which seems possible in many situations, no employment sanctions could be applied. The whistleblower provisions have had the effect of removing the longstanding right of a client to discharge a lawyer.[114]

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113. *See* Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443-449 (1977) (holding that President must comply with Congressional act requiring him to turn over materials for screening by government archivists). *See also* Federal Labor Relations Auth. v. United States, 884 F.2d 1446 (D.C. Cir. 1989) (although names and addresses of federal agency employees were necessary information under Federal Labor Relations Act and normally would be required to be disclosed, such disclosure was prohibited by Privacy Act and employees' privacy interest outweighed public interest in collective bargaining).

114. *See* WOLFRAM, *supra* note 30, at 154 (client's ability to discharge a lawyer); Herbster v. North Am. Co., 501 N.E.2d 343 (Ill. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987) (corporation's general counsel could not bring retaliatory discharge claim because he was

The legislative history of the whistleblower provisions is lacking in any consideration of their potential effect on the professional obligations of lawyers and the normal conception of the lawyer-client relationship as one in which the lawyer serves only at the will of the client. None of the many lawyer-legislators who participated in the consideration of the legislation raised the issue. Representatives of the Department of Justice and other agencies testified on the legislation but never raised these issues.[115] The American Bar Association (ABA), believing that public disclosure of official wrongdoing was desirable in a democracy, supported Common Cause and other groups in urging enactment of the legislation.[116] ABA officials who proposed the resolution supporting the creation and expansion of whistleblower protection apparently never considered the possibility that a lawyer might act as a whistleblower and that such conduct would be inconsistent with normal professional duties of confidentiality which the ABA has taken very seriously.[117]

There is a long tradition of lawyers assuming that general legal requirements applicable to others do not apply to them.[118] When push comes to shove, however, the legal immunity of lawyers turns out to be much narrower than lawyers perceive it to be. Tort immunity for statements made during litigation are privileged, but lawyers may be and are punished for obstruction of justice and other crimes.[119] Although interpretive issues frequently arise, general regulatory statutes regulating the provision of services are usually held to be applicable to legal services in the absence of a statutory exemption.[120] Although it is possible that the courts will view the

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an at-will employee, even though discharge allegedly based on refusal to destroy or remove discovery information); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd in part on other grounds*, 855 F.2d 1160 (5th Cir. 1988) (public policy exception to employment-at-will doctrine would not be expanded to include attorney who believed he had been asked to violate law).

115. *Whistleblower Protection Act of 1987: Hearings before the Subcomm. on Civil Service of the House Post Office and Civil Service Committee*, 100th Cong., 1st Sess. 3-78 (1987) (statements of Stuart E. Schiffer, Deputy Assistant Attorney, Gen. Civil Div., Justice Dep't, and Mary F. Wieseman, Special Counsel, OSC, MSPB).

116. 135 CONG. REC. S2779 (daily ed. March 16, 1989) (Exhibit 2, letter from American Bar Association supporting the legislation).

117. Conversations of the author with Willis B. Snell, a Washington, D.C. lawyer, and Richard H. Keatinge, of Los Angeles, both of whom were active participants in the consideration of the resolution by the Section of Administrative Law and the House of Delegates of the American Bar Association.

118. This is one of the principal theses of an excellent article by Susan P. Koniak entitled *The Law Between the Bar and the State* (citation not available at this time).

119. For a discussion of the absolute immunity of those involved in judicial proceedings (judges, lawyers, parties, jurors, etc.), see W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS, § 114, at 817-820 (5th ed. 1984). Cases in which lawyers have been convicted of obstruction of justice include *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (lawyer convicted of obstructing justice even though conduct on which the charge was based, i.e., advising a client, was not itself unlawful; the lawyer's improper intent, that of protecting other clients, makes the conduct punishable).

120. Among the many cases involving the question of whether general statutes designed to protect

policies of the whistleblower enactment as not requiring the displacement of lawyer confidentiality, thus carving out a general exception for lawyers employed by the federal government, that result is problematic.

In the meantime, federal lawyers must and will act under the kind of uncertainty which citizens often face in a world in which law is omnipresent, complex, ambiguous and uncertain. It is not surprising that to date there is no instance of public disclosure by a federal lawyer pursuant to the whistleblower provisions (some anonymous federal lawyers have secretly leaked grand jury or other sensitive information). Although whistleblower protection has been in effect since 1978, no government lawyer has invoked its protection. Perhaps the lesson of this tale is that other factors outweigh the benefits of possible whistleblower protection. The education and socialization of lawyers inculcates a strong acceptance of the confidentiality ethic.[121] There is enormous institutional hostility against whistleblowers, whose betrayal of organizational norms cannot be altered by formal legislative language. There is the traditional assumption of lawyers is that many general requirements of the law do not override fundamental professional obligations, especially the strictures of confidentiality. Finally, there is the lurking fear that a court may hold, at least in this instance, that this assumption is justified and that Congress did not intend to override the lawyer's obligations of confidentiality by enacting protective provisions for government employees who blow the whistle. Until and unless lawyers avail themselves of the whistleblower provisions, forcing agency heads and the courts to wrestle with these complexities, we will not have authoritative answers to these vexing questions. Although congressional action to supply specific answers may be desirable, the problem is unlikely to have sufficient political interest to command legislative attention unless and until such cases arise.

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consumers are applicable to the provision of legal services, see *Iowa ex rel. Miller v. Rahmani*, 7 Laws. Man. of Prof. Conduct (ABA/BNA) 198 (Iowa Supreme Court, No. 212/90-470, June 19, 1991), holding that an Iowa consumer fraud statute is applicable to lawyers, but the lawyer did not make the false or deceptive representation when he merely passed on promotional literature prepared by and later mailed out by the client; and *Debakey v. Staggs*, 605 S.W.2d 631 (Tex. Civ. App. 1980), holding that a lawyer is subject to a treble-damages action by a consumer of legal services under the Texas Deceptive Trade Practices Act.

121. *See* Koniak, *supra* note 118.